

DISTRIBUTABLE (69)

(1) TENDAYI TAMANIKWA (2) FRANK TINARWO
v
(1) ZIMBABWE MANPOWER DEVELOPMENT FUND (2)
EMMERSON PAMIRE

**SUPREME COURT OF ZIMBABWE
GWAUNZA JA, BHUNU JA & UCHENA JA
HARARE, SEPTEMBER 19, 2017 & NOVEMBER 14, 2017**

C. Mucheche, for the appellant

G. Machingambi, for the respondent

**Judgment No. SC 73/17
Civil Appeal No. SC 448/16**

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BHUNU JA: This is an appeal coupled with a cross-appeal against the judgment of the Labour Court. Both appellants in the main appeal and the respondent in the cross appeal Emmerson Pamire were employed by the respondent. Following leakages of confidential information at the work place, the respondent ordered them to sign declaration of secrecy forms. They wilfully disobeyed that order and were suspended from employment pending disciplinary action.

As managerial employees, the first and second appellants had been issued with motor vehicles by their employer. Upon suspension they were ordered to return the motor vehicles. They both wilfully refused to return the motor vehicles as ordered by the employer.

All the 3 employees were eventually charged with wilful disobedience to lawful orders before the Disciplinary Authority. They were all found guilty as charged and dismissed from employment on 28 November 2013. Disgruntled by their dismissal from employment, they approached the labour officer, who in turn referred the dispute for arbitration in terms of s 93 of the Labour Act [Chapter 28:01].

The terms of reference before the arbitrator branded, “CLAIMANTS’ ISSUES FOR DETERMINATION” were as follows:

“Whether or not the dismissal of the three claimants was fair and lawful?

1. Whether or not the employer was entitled at law to institute fresh disciplinary proceedings without complying with the Supreme Court order of 16 July 2013 ordering them to reinstate the claimants without loss of salary and benefits?
2. Whether or not it was lawful for the employer to charge first and third claimants with wilful disobedience of lawful orders arising out of their failure to handover vehicles when the matter of ownership and possession of the vehicles was *sub judice* (the subject of a legal dispute) which is still pending in the High court in case numbers HC 6419/2010, HC 6420/10, HC 4233/10, and HC 4258/2010 which cases were all consolidated under case number HC 4258/2010 for purposes of trial? Judgment No. SC 73/17
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3. Whether the labour dispute leading to the disciplinary proceedings instituted by the respondent against claimants on 17 July 2013 had prescribed in terms of section 94 of the Labour Act Chapter 28:01 and whether the respondent had a right to charge the claimants for misconduct over the events that allegedly occurred on August 2009?”

The arbitrator on the basis of the terms of reference placed before her found that the employer’s orders were lawful as they were meant to advance the employer’s business. She accordingly upheld the claimants’ conviction. She however, overturned the penalty of dismissal and substituted it with a lesser penalty of final written warning. The award reads:

“AWARD

1. The Respondent Zimbabwe Manpower Development Fund (ZIMDEF) be and is hereby ordered to substitute the dismissal penalty with a final written warning valid for twelve (12) Months.
2. Respondent be and is hereby ordered to reinstate the claimants without loss of pay and benefits from the date of dismissal.

3. If reinstatement is no longer tenable parties may negotiate for damages in lieu of reinstatement failure of which either party may approach the arbitrating authority for quantification.”

Dissatisfied with the above order reinstating the 3 respondents, the employer appealed to the Labour Court. The respondents did not however cross-appeal against the arbitrator’s award upholding the Disciplinary Authority’s verdict convicting them of dismissible acts of misconduct as charged.

The second respondent in the court *a quo*, Emmerson Pamire was however partially successful in that Court. The court *a quo* set aside the arbitrator’s award and upheld the decision of the Disciplinary Authority dismissing the first and third respondents from employment as prayed for by the employer.

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The appeal against the reinstatement of the second respondent in the court *a quo* was however unsuccessful in that the court *a quo* upheld the arbitrator’s order of reinstatement. The court *a quo*’s order reads:

“WHEREFORE IT IS ORDERED THAT:

1. The appeal be and is hereby allowed.
2. The arbitration award issued by arbitrator C K Kadenga dated 8 December 2015 is set aside.
3. The dismissal from employment of 1st and 3rd respondents (Tendayi Tamanikwa and Frank Tinarwo) by appellant is upheld.
- 4(a) The appellant shall reinstate the 2nd respondent Emmerson (Emmerson Pamire) without loss of salary and benefits, or
- (b) If reinstatement is no longer tenable, appellant shall pay 2nd respondent damages in such (sic) either agreed by the parties or assessed by this court.”

Unhappy with the Court *a quo*’s judgment ordering their dismissal from employment, the first and second appellants in the main appeal, Tendayi Tamanikwa and Frank Tinarwo, appealed against part of the court *a quo*’s judgment upholding their dismissal

from employment. Having appealed only against part of the judgment, they erroneously went on to pray for the setting aside of the whole judgment.

The notice of appeal reads:

“TAKE NOTICE that the Appellants hereby appeal against part of the judgment of the Labour Court...” (*My emphasis*).

Whereas the relief sought reads as follows:

“RELIEF SOUGHT:

The appellants seek the following relief:

1. That the appeal is allowed with costs.
2. That the judgment of the court a quo is set aside and in its place substituted by the following:
 - 2.1 The dismissal from employment of the 1st and 2nd appellants be and is hereby set aside.
 - 2.2 The Respondent shall reinstate the 1st and 2nd Appellants without loss of salary and benefits with effect from their date of dismissal.
 - 2.3 If reinstatement is no longer suitable, the Respondent shall pay damages to the 1st and 2nd Appellants without loss of salary and benefits to be agreed or assessed by the Labour Court.”

It is plain that the notice of appeal and the relief sought by the appellants are irreconcilably contradictory. It is rather irrational for the appellants to appeal against only part of the judgment and then seek to have the whole judgment set aside.

The learned Chief Justice in his routine supervisory and administrative functions noted the fatal irregularity and engaged counsel for the appellants with a view to enlighten him about the fatal defect in his notice of appeal. His *extra curial* intervention was made in good faith to avoid clogging the court with fatally defective appeals. As the Chief Justice was not presiding over a court but merely performing his administrative function there was

nothing he could do to prevent counsel from taking his patently defective notice of appeal to court.

Disputing the fatality of the defects in his notice of appeal, counsel for the appellants steadfastly stuck to his guns and refused to take the learned Chief Justice’s wise counsel. It however dawned on counsel later on that his notice of appeal was defective. He then filed an application to amend the defective notice of appeal on 6 September 2017.

In his application to amend the notice to appeal counsel for the appellants acknowledged that the notice was defective for want of compliance with r 7 (b) of the Supreme Court (Miscellaneous Appeals and References) Rules 1975 in two material respects, namely:

1. The misnaming of the parties in the prayer as described at sub para 2.2 and
2. The non-statement in para 2 of the prayer that only part of the judgment of the court *quo* should be set aside.

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While accepting that his notice of appeal was defective Mr *Machingambi* for the appellants sought to persuade the court that the above defects in his notice of appeal were not fatal as they are capable of being amended. Rule 7 is however couched in peremptory terms admitting no exception. It reads:

“7. Contents of notice of appeal

A notice instituting an appeal shall state—

- (a) the tribunal or officer whose decision is appealed against; and
- (b) the date on which the decision was given; and
- (c) the grounds of appeal; and
- (d) *the exact nature of the relief sought; and*
- (e) the address of the appellant or his legal representative” (My emphasis)

It is settled law that save in exceptional circumstances, the term ‘shall’, denotes the law maker’s intention to render the rule mandatory. This Court has ruled on numerous occasions that failure to comply with mandatory provisions of the Rules of court will render an appeal a nullity. *In Chikura and Another v Al Sham’s Global BVI Limited* SC 17/2017 ZIYAMBI JA had occasion to remark that:

“The Rules are made for the proper running of the Court. Failure to comply with its mandatory provisions will render an appeal a nullity. See *Matanhire v BP & Shell Marketing Services (Pvt) Ltd* 2004 (2) ZLR 147 (S)”

In *Freezewell Refrigeration Services (Private) Limited v Bard Real Estate (Private) Limited* SC 61/03, this Court held that a fatally defective appeal cannot be condoned or amended. It can only be struck off. The notice of appeal in this case is therefore fatally defective and a nullity at law. For that reason it is incurably bad and beyond repair.

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The authorities are clear and it is now a matter of settled elementary law that when a proceeding is a nullity every proceeding based on it is also a nullity as observed by KORSAN JA in *Ngani v Mbanje & another; Mbanje & Another v Ngani*, 1987 (2) ZLR 111 at p115 where the learned judge relying on the dicta in *Mc Foy v United Africa Company Ltd* ALL E R 1169 remarked that:

“If an act is in law a nullity, it is not only bad, but incurably bad. There is no need for the order of the Court to set it aside. It is automatically null and void without more ado. Though it is sometimes more convenient to do so. *And every proceeding founded on it is also bad and incurably bad.* You cannot put something on nothing and expect it to stay there. It will collapse”. (*My emphasis*).

What this means in simple terms is that the application to amend the fatally defective appeal is also in itself fatally defective and a nullity at law. For the foregoing

reasons this Court unanimously holds that both the notice of appeal and the application to amend are fatally defective warranting being struck off without any further ado.

Mr *Mucheche* for the respondent in the main appeal has asked for costs on the higher scale. Mr *Machingambi* sought to resist costs at the punitive scale arguing that the Chief Justice was not sitting as a court and therefore he was at liberty to disregard his caution.

It is correct that the Chief Justice was not sitting as a court but his views mattered. The administrative function to scrutinise court records and engage lawyers before going to court is a noble objective meant to save time and money by nipping defects in the bud before they get to court.

While Mr *Machingambi* was not bound by the learned Chief Justice's opinion it was wise to take heed of his caution unless he was sure of what he was doing. Had he taken heed, he would not have taken a dead case to court wasting everyone's time and putting the other party to unnecessary expense. Those who deliberately defy wise counsel and go on to negligently cause others patrimonial loss must not cry foul when they are made to make good the loss. Costs at the punitive scale are therefore warranted.

It would in the court's view be unjust for Mr *Machingambi*'s clients to bear the burden of making good the loss when it is his questionable conduct that caused it. Legal practitioners must be warned that this is the sort of conduct that may attract costs *de bonis propriis*. By negating sound advice and incurring unnecessary costs in the process, Mr *Machingambi* was doing his clients a disservice. For that reason the court considered that it would be patently unjust and unfair to allow him to benefit from his indecorous conduct.

It is for the foregoing reasons that the court proceeded to issue the following order:

“Whereupon, after reading papers filed of record,
IT IS ORDERED THAT:-

1. The application to amend the Notice of Appeal is dismissed with costs on the higher scale.
2. The Applicant’s Counsel Mr. G Machingambi is barred from charging fees to his clients for the application to amend the defective notice of appeal.
3. The Cross-appeal is to be heard.”

Turning to the cross-appeal, the appellant is appealing against the reinstatement of the respondent, Emmerson Pamire to his former employment.

The main appeal was dismissed with costs at the legal practitioner client scale leaving the concerned parties to argue the cross appeal. I now proceed to consider the cross appeal. The facts giving rise to the cross appeal are by and large common cause. The undisputed facts are that the disciplinary authority convicted the respondent of wilful disobedience to a lawful order to sign declaration of secrecy forms and ordered his dismissal from employment. He appealed to the arbitrator who upheld the conviction but reduced the penalty of dismissal to one of final written warning. The arbitrator then ordered his reinstatement without any loss of salary or benefits. In the alternative the court *a quo* ordered damages to be assessed in the event that reinstatement was no longer possible.

The appellant appealed to the court *a quo* against the order to reinstate the respondent. The respondent did not however, cross appeal against the arbitrator’s verdict upholding the disciplinary authority’s verdict of guilty.

The respondent's failure to cross appeal against conviction can only mean that he accepted his guilt as charged. All he was challenging in the court *a quo* was the severity of punishment and not his conviction. His plea in the court *a quo* was one for mercy rather than a denial of misconduct as alleged.

As none of the parties questioned the correctness of the guilty verdict and in the absence of a cross-appeal, the appeal in the court *a quo* fell to be determined on the basis of the issues raised by the appellant in its grounds of appeal which were laid down before the court as follows:

- “1. The arbitrator erred on a question of law by substituting the employer's discretion to impose a dismissal penalty.
2. The arbitrator erred on a question of law by not realising that the respondent(s') misconduct went to the root of their employment contract(s) thereby justifying a dismissal penalty.
3. The arbitrator grossly erred and misdirected himself that she had no jurisdiction on the second count against the respondents as per section 4 (2) b of the Arbitration Act.
4. The arbitrator grossly erred and misdirected herself at law by failing to find that the appeal to the internal appeals officer was filed out of time.”

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From the above grounds of appeal it is self-evident that the question of liability was not one of the issues to be determined by the court *a quo* as that issue had already been conclusively determined by the lower adjudicating authorities. It was therefore remiss of the court *a quo* to determine an issue that was not before it when it held at p3 para 5 of its cyclostyled judgment that:

- “5. All respondents were not guilty of the charge related to the secrecy document.”

By framing and determining its own issue not raised by the parties, the court *a quo* erred and strayed into the wilderness of illegality. The respondent's failure to challenge the question of liability amounts to an admission of guilt. It was therefore grossly irrational

for the court *a quo* to find the respondent not guilty as charged in circumstances where he was virtually pleading guilty to the charge.

It being common cause that the respondent committed a dismissible act of misconduct, it was within the employer's discretion to terminate his employment contract. Following the exercise of that discretion there was no proper or compelling reason advanced as to why the court *a quo* or anyone else for that matter should interfere with the exercise of that discretion. In the absence of any cogent reason for interfering with the employer's discretion, the respondent's fate was sealed. The words of ZIYAMBI JA in *Mashonaland Turf Club v Mutangadura* 2012 (1) ZLR 183 (S) are worth recounting where she says:

“In the exercise of their powers in terms of section 12B (4) of the Labour Act, the Labour Court and Arbitrators must be reminded that the section does not confer upon them an unbounded power to alter a penalty of dismissal imposed by an employer just because they disagree with it. In the absence of misdirection or unreasonableness on the part of the employer in arriving at the decision to dismiss an employee, an appeal court will generally not interfere with the exercise of the employer's discretion to dismiss an employee found guilty of misconduct which goes to the root of the contract of employment.”

It is an implied term of every employee's contract of employment not to make unauthorised disclosure of his employer's secrets. The refusal by the respondent in the cross appeal to sign the declaration of secrecy was therefore, a fundamental breach of his implied term of employment in this respect. An employer cannot be blamed for offloading an employee who refuses to be bound not to disclose his trade secrets. The need for confidentiality in an employer/employee relationship cannot be over emphasised. For that reason it cannot be said by any stretch of the imagination that the appellant in the cross-appeal acted irrationally or unreasonably when it terminated the contract for wilful refusal to sign the declaration of secrecy. No sane employer would be comfortable employing an employee whom he cannot trust to keep his secrets.

In the result it is ordered that:

1. The cross appeal is allowed with costs.
2. The judgment of the court *a quo* is partially quashed to the extent that it set aside respondent's conviction on the charge of wilful disobedience of a lawful order and consequently paragraph (4) of the operative part of that judgment is set aside and substituted as follows:-

“The appeal is allowed with costs, the arbitral award is set aside in respect of the penalty of a final written warning imposed upon the respondents and consequently the respondents' dismissal from employment is confirmed.”

GWAUNZA JA: I agree

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UCHENA JA: I agree

Matsikidze and Mucheche Commercial and Labour law chambers, appellant's legal practitioners

G. Machingambi, respondent's legal practitioners